



## DEPARTMENT OF JUSTICE

### Office of the Attorney General

#### 28 CFR Part 0

[BOP Docket No. 1179; AG Order No. 5641-2023]

RIN 1120-AB79

### Home Confinement Under the Coronavirus Aid, Relief, and Economic Security (CARES) Act

**AGENCY:** Office of the Attorney General, Department of Justice.

**ACTION:** Final rule.

**SUMMARY:** The Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) authorizes the Director of the Bureau of Prisons (“Director”), during the covered emergency period and upon a finding by the Attorney General that emergency conditions resulting from the Coronavirus Disease 2019 (“COVID-19”) pandemic materially affect the functioning of the Bureau of Prisons (“Bureau” or “BOP”), to lengthen the maximum amount of time for which a prisoner may be placed in home confinement. The Department of Justice (“Department” or “DOJ”) promulgates this final rule to affirm that the Director has the authority and discretion to allow prisoners placed in home confinement under the CARES Act to remain in home confinement after the expiration of the covered emergency period.

**DATES:** This rule is effective [*INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER*].

**FOR FURTHER INFORMATION CONTACT:** Daniel J. Crooks III, Assistant General Counsel, Federal Bureau of Prisons, (202) 353-4885.

#### SUPPLEMENTARY INFORMATION:

##### I. Overview.

In this document, the Department promulgates a final rule (“rule”) granting the Director

the authority and discretion to allow prisoners placed in home confinement under the CARES Act to remain in home confinement after the expiration of the covered emergency period. The Department published a proposed rule on this subject on June 21, 2022 (87 FR 36787), with a comment deadline of July 21, 2022.

## **II. Background.<sup>1</sup>**

On March 13, 2020, the President of the United States declared that a national emergency existed with respect to the outbreak of COVID-19, beginning on March 1, 2020.<sup>2</sup> COVID-19 is caused by an extremely contagious virus known as SARS-CoV-2 that has spread quickly around the world.<sup>3</sup> COVID-19 most often causes respiratory symptoms, but can also attack other parts of the body. The virus spreads when an infected person breathes out droplets and particles, and another person breathes in air that contains these droplets and particles, or they land on another person's eyes, nose, or mouth.<sup>4</sup> Individuals in close contact with an infected person—generally less than six feet apart—are most likely to get infected. Although COVID-19 often presents with mild symptoms, some people become severely ill and die. Older adults and individuals with underlying medical conditions are at increased risk of severe illness.<sup>5</sup>

The U.S. Centers for Disease Control and Prevention (“CDC”) has recognized that the COVID-19 pandemic presents unique challenges for correctional facilities, such as those the Bureau manages.<sup>6</sup> These challenges include a high risk of rapid transmission due to congregate

---

<sup>1</sup> For a more detailed discussion of the overview and background of CARES Act home confinement, see Sections II.A. and II.B. of the preamble to the proposed rule. 87 FR 36788–95.

<sup>2</sup> Proclamation 9994, Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, 85 FR 15337 (Mar. 18, 2020).

<sup>3</sup> U.S. Centers for Disease Control and Prevention, *Basics of COVID-19* (last updated Nov. 4, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/your-health/about-covid-19/basics-covid-19.html>.

<sup>4</sup> U.S. Centers for Disease Control and Prevention, *How COVID-19 Spreads* (last updated Aug. 11, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>.

<sup>5</sup> U.S. Centers for Disease Control and Prevention, *Basics of COVID-19* (last updated Nov. 4, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/your-health/about-covid-19/basics-covid-19.html>.

<sup>6</sup> CDC, *Considerations for Modifying COVID-19 Prevention Measures in Correctional and Detention Facilities Webinar Transcript* (June 22, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/videos/covid-19-prevention/Webinar-Transcript-508.pdf>.

living settings, and a high risk of severe disease due to the high prevalence of pre-existing conditions and risk factors associated with severe COVID-19 illness in prison populations. Since the earliest days of the pandemic, Department and Bureau officials have worked in tandem to develop and implement a plan to mitigate the high risk of rapid transmission of COVID-19 in the Federal prison system.

In March 2020, several United States Senators urged the Attorney General and the Director to utilize available statutory authorities to transfer vulnerable prisoners to home confinement.<sup>7</sup> Transferring these vulnerable prisoners to home confinement would remove them from an environment in which contagious viruses thrive due to the inherent risks of congregate settings and the unique restrictions that correctional custody places on an individual's ability to maintain an appropriate social distance, as well as permit them to undertake other measures to protect themselves in ways they are not able to do in secure custody.

The Attorney General issued a memorandum on March 26, 2020, instructing the Director to prioritize the use of home confinement, where authorized, to protect the health and safety of inmates and Bureau staff by minimizing the risk of COVID-19 spread in Bureau facilities, while continuing to keep communities safe.<sup>8</sup> The Attorney General directed that the determination of whether to place an inmate in home confinement should be made on an individualized basis, considering the totality of the inmate's circumstances, statutory requirements, and a non-exhaustive list of discretionary factors:

- The age of the inmate and the vulnerability of the inmate to COVID-19;
- The security level of the facility housing the inmate, with priority given to inmates

---

<sup>7</sup> Letter for William P. Barr, Attorney General, and Michael Carvajal, Director, BOP, from Senator Richard J. Durbin *et al.* (Mar. 23, 2020),

<https://www.durbin.senate.gov/imo/media/doc/Letter.%20to%20DOJ%20and%20BOP%20on%20COVID-19%20and%20FSA%20provisions%20-%20final%20bipartisan%20text%20with%20signature%20blocks.pdf>.

<sup>8</sup> Memorandum for the Director, BOP, from the Attorney General, *Re: Prioritization of Home Confinement As Appropriate in Response to COVID-19 Pandemic* (Mar. 26, 2020),

[https://www.bop.gov/coronavirus/docs/bop\\_memo\\_home\\_confinement.pdf](https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement.pdf).

residing in low- and minimum-security facilities;

- The inmate's conduct in prison;
- The inmate's risk score under the Prisoner Assessment Tool Targeting Estimated Risk and Needs ("PATTERN");<sup>9</sup>
- Whether the inmate had a reentry plan that would help prevent recidivism and maximize public safety; and
- The inmate's crime of conviction and the danger the inmate would pose to the community.<sup>10</sup>

The Attorney General's memorandum explained that some offenses would render an inmate ineligible for home confinement, and that other serious offenses would weigh more heavily against consideration for home confinement. It further explained that inmates who engaged in violent or gang-related activity while in prison, those who incurred a violation within the past year, or those with a PATTERN score above the "minimum" range would not receive priority consideration under the memorandum.<sup>11</sup>

On March 27, 2020, the day after the Attorney General's first memorandum, the President signed into law the CARES Act,<sup>12</sup> which expanded the Director's authority and

---

<sup>9</sup> PATTERN is a tool that measures an inmate's risk of recidivism and provides her with opportunities to reduce her risk score. See, e.g., BOP, *PATTERN Risk Assessment*, <https://www.bop.gov/inmates/fsa/pattern.jsp>. It was created pursuant to the First Step Act of 2018. See Pub. L. 115-391, sec. 101(a), sec. 3632(a), 132 Stat. 5194, 5196–97.

<sup>10</sup> Memorandum for the Director, BOP, from the Attorney General, *Re: Prioritization of Home Confinement As Appropriate in Response to COVID-19 Pandemic* (Mar. 26, 2020), [https://www.bop.gov/coronavirus/docs/bop\\_memo\\_home\\_confinement.pdf](https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement.pdf).

<sup>11</sup> Memorandum for the Director, BOP, from the Attorney General, *Re: Prioritization of Home Confinement As Appropriate in Response to COVID-19 Pandemic* (Mar. 26, 2020), [https://www.bop.gov/coronavirus/docs/bop\\_memo\\_home\\_confinement.pdf](https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement.pdf). This criterion was later updated to include low and minimum PATTERN scores. See Memorandum for Chief Executive Officers, from Andre Matevousian *et al.*, BOP, *Re: Home Confinement* (Apr. 13, 2021), [https://www.bop.gov/foia/docs/Home%20Confinement%20memo\\_2021\\_04\\_13.pdf](https://www.bop.gov/foia/docs/Home%20Confinement%20memo_2021_04_13.pdf).

<sup>12</sup> "During the covered emergency period, if the Attorney General finds that emergency conditions will materially affect the functioning of the Bureau, the Director of the Bureau may lengthen the maximum amount of time for which the Director is authorized to place a prisoner in home confinement under the first sentence of section 3624(c)(2) of title 18, United States Code, as the Director determines appropriate." CARES Act, Pub. L. 116-136, sec. 12003(b)(2), 134 Stat. 281, 516 (2020).

discretion to place inmates in home confinement in direct response to the COVID-19 pandemic during a “covered emergency period.” In relevant part, the CARES Act provides that the “covered emergency period” begins the date the President declared a national emergency with respect to COVID-19 and ends 30 days after the date on which the national emergency terminates.<sup>13</sup>

On April 3, 2020, the Attorney General issued a second memorandum to the Director, finding that emergency conditions were materially affecting the functioning of the Bureau, and instructing the Director to use the expanded home confinement authority provided in the CARES Act to place in home confinement the most vulnerable inmates at the facilities most affected by COVID-19.<sup>14</sup> The Bureau subsequently issued internal guidance that adopted the criteria in the Attorney General’s memoranda and prioritized for home confinement inmates who had served 50 percent or more of their sentences, or those who had 18 months or less remaining on their sentences and had served more than 25 percent of that sentence.<sup>15</sup> The Bureau later clarified that inmates with low or minimum PATTERN scores would qualify equally for home confinement, and that the factors assessed to ensure inmates were suitable for home confinement included verifying that an inmate’s current or prior offense was not violent, not a sex offense, and not terrorism-related.<sup>16</sup> Since March 2020, the Bureau has significantly increased the number of inmates placed in home confinement under the CARES Act and other preexisting authorities. Between March 26, 2020, and January 23, 2023, the Bureau placed in home confinement a total

---

<sup>13</sup> *Id.* sec. 12003(a)(2).

<sup>14</sup> Memorandum for the Director, BOP, from the Attorney General, *Re: Increasing Use of Home Confinement at Institutions Most Affected by COVID-19*, at 1 (Apr. 3, 2020), [https://www.bop.gov/coronavirus/docs/bop\\_memo\\_home\\_confinement\\_april3.pdf](https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement_april3.pdf).

<sup>15</sup> *See, e.g.*, Memorandum for Chief Executive Officers, from Andre Matevousian *et al.*, BOP, *Re: Home Confinement* (Nov. 16, 2020), [https://www.bop.gov/foia/docs/Updated\\_Home\\_Confinement\\_Guidance\\_20201116.pdf](https://www.bop.gov/foia/docs/Updated_Home_Confinement_Guidance_20201116.pdf).

<sup>16</sup> *See* Memorandum for Chief Executive Officers, from Andre Matevousian *et al.*, BOP, *Re: Home Confinement* (Apr. 13, 2021), [https://www.bop.gov/foia/docs/Home%20Confinement%20memo\\_2021\\_04\\_13.pdf](https://www.bop.gov/foia/docs/Home%20Confinement%20memo_2021_04_13.pdf).

of 52,561 inmates.<sup>17</sup> The majority of those inmates have since completed their sentences; as of January 23, 2023, there were 5,597 inmates in home confinement.<sup>18</sup> According to the Bureau, 3,434 of these inmates were placed in home confinement pursuant to the CARES Act.<sup>19</sup>

An inmate placed in home confinement is not considered released from Bureau custody. Rather, the inmate continues serving their sentence at home in their community. These individuals must follow a set of rules designed to aid in their management, facilitate their reintegration into society, and support their rehabilitative efforts. For example, they are required to remain in the home during specified hours and are permitted to leave only for work or other preapproved activities, such as occupational training or therapy. Moreover, inmates in home confinement must submit to drug and alcohol testing and counseling requirements. Supervision staff monitor inmates' compliance with the conditions of home confinement by electronic monitoring equipment or, in a few cases for medical or religious accommodations, frequent telephone and in-person contact.<sup>20</sup> To remain in home confinement, inmates must comply with their agreed-upon conditions of supervision.<sup>21</sup>

Section 12003(b)(2) of the CARES Act authorizes the Director to place inmates in home confinement, notwithstanding the time limits set forth in 18 U.S.C. 3624(c)(2), during and for 30 days after the termination of the national emergency declaration concerning COVID-19, provided the Attorney General has made a finding that emergency conditions are materially affecting the Bureau's functioning. By the Act's plain terms, the Director's authority to place an

---

<sup>17</sup> See BOP, *Frequently Asked Questions regarding potential inmate home confinement in response to the COVID-19 pandemic*, <https://www.bop.gov/coronavirus/faq.jsp> (last visited Jan. 3, 2023).

<sup>18</sup> See *id.*

<sup>19</sup> As of January 25, 2023, 5,613 inmates are currently in home confinement, with 3,436 of those individuals in CARES Act home confinement.

<sup>20</sup> BOP, Program Statement 7320.01, Home Confinement (Sept. 6, 1995), as updated by Change Notice (Dec. 15, 2017), [https://www.bop.gov/policy/progstat/7320\\_001\\_CN-2.pdf](https://www.bop.gov/policy/progstat/7320_001_CN-2.pdf).

<sup>21</sup> See *id.* at 12–15 (including agreement outlining terms of home confinement); see also BOP Form BP-A0548, Home Confinement and Community Control Agreement (June 2010), [https://www.bop.gov/policy/forms/BP\\_A0548.pdf](https://www.bop.gov/policy/forms/BP_A0548.pdf).

inmate in home confinement under the CARES Act expires at the end of the covered emergency period, or if the Attorney General revokes his finding.

The Act is silent, however, as to whether the Director has discretion to determine whether specific individuals placed in home confinement under the CARES Act may remain there after the expiration of the covered emergency period, or whether all inmates who are not eligible for home confinement under another authority must be returned to secure custody. The Department has concluded that the most reasonable interpretation of the CARES Act permits the Bureau to continue to make individualized determinations about the conditions of confinement for inmates placed in home confinement under the CARES Act, as it does with respect to all prisoners,<sup>22</sup> following the end of the covered emergency period. In its recent opinion, the Office of Legal Counsel (“OLC”) concluded that section 12003(b)(2) does not require the Bureau to return to secure custody inmates in CARES Act home confinement following the end of the covered emergency period. *See Discretion to Continue the Home-Confinement Placements of Federal Prisoners After the COVID-19 Emergency*, 45 Op. O.L.C. \_\_ (Dec. 21, 2021) (“*Home-Confinement Placements*”). The Department hereby incorporates the analysis from that OLC opinion into the preamble of this final rule. Even if the relevant provision of the CARES Act were considered ambiguous, however, the Department’s interpretation represents a reasonable one that would warrant deference under *Chevron, U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837 (1984).<sup>23</sup>

While the home confinement program under the CARES Act has been a measurable success, inmates and their families have sought assurance that those already in home confinement will not be abruptly returned to secure custody after the end of the covered emergency period. The Department remains sensitive to these concerns and agrees with the

---

<sup>22</sup> See 18 U.S.C. 3621(a) (“A person who has been sentenced to a term of imprisonment . . . shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed . . .”).

<sup>23</sup> See *Home-Confinement Placements*, 45 Op. O.L.C. \_\_, at \*2, \*15.

expressions of support from some Members of Congress for expanding the use of home confinement based on the needs of individual offenders.<sup>24</sup> With that in mind, the Department's interpretation is that any ambiguity in the CARES Act should be read to provide the Director with discretion to allow inmates placed in home confinement who have been successfully serving their sentences in the community to remain there, rather than require the Director to return such inmates to secure custody *en masse* without making an individualized assessment or identifying a penological, rehabilitative, public health, or public safety basis for the action. Although placements under the CARES Act were not made for reentry purposes, the Department concludes that the best use of Bureau resources and the best outcome for affected offenders is to allow the agency to make individualized assessments of CARES Act placements, with a focus on supporting inmates' eventual reentry into the community.

After publication of this final rule, the Department and the Bureau will work together to develop guidance to explain objective criteria the Bureau will use to make individualized determinations as to whether any inmate placed in home confinement under the CARES Act should be returned to secure custody. Providing the Bureau with discretion to determine whether any inmate placed in home confinement under the CARES Act should return to secure custody will bolster the Bureau's ability to efficiently manage its resources and nimbly address changing circumstances in the community, in relation to the needs and profiles of individual inmates.

\* \* \*

For the reasons provided in this final rule, the Department codifies the Director's discretion to allow inmates placed in home confinement pursuant to the CARES Act to remain in

---

<sup>24</sup> See, e.g., Senate Committee on the Judiciary, *Durbin, Booker: We Should Not Force Individuals on Home Confinement to Return to Prison* (July 20, 2021), <https://www.judiciary.senate.gov/press/dem/releases/durbin-booker-we-should-not-force-individuals-on-home-confinement-to-return-to-prison>; Letter for Colette S. Peters, Director, BOP, from Representative Bonnie Watson Coleman, Representative Pramila Jayapal, and Representative Henry C. "Hank" Johnson Jr. (Oct. 7, 2022), [https://watsoncoleman.house.gov/imo/media/doc/letter\\_to\\_bop\\_dir\\_peters.pdf](https://watsoncoleman.house.gov/imo/media/doc/letter_to_bop_dir_peters.pdf); Press Release, Representative Kelly Armstrong, *Armstrong Supports DOJ Decision Allowing Inmates Released Under CARES Act to Remain in Home Confinement* (Dec. 21, 2021), <https://armstrong.house.gov/media/press-releases/armstrong-supports-doj-decision-allowing-inmates-released-under-cares-act>.



home confinement after the covered emergency period expires. This rule reflects the interpretation of the CARES Act set forth in OLC's December 21, 2021, opinion,<sup>25</sup> is consistent with recent legislation from Congress supporting expanded use of home confinement,<sup>26</sup> and advances the best interests of inmates and the Bureau from penological, rehabilitative, public health, and public safety perspectives.<sup>27</sup>

### **III. Discussion of Comments and the Department's Responses.**

#### **A. General Overview**

The Department received a total of 71 comments in response to the notice of proposed rulemaking. Of those 71 comments, 66 were substantive,<sup>28</sup> and of those 66 substantive comments, three were neutral (neither in support of, nor in opposition to, the proposed rule) and one was opposed, leaving 62 total substantive comments in support of the final rule. Of the 62 total substantive comments in support, 28 are substantive statements in support, with no suggested revisions, while 34 are substantive statements in support, with suggested revisions.

#### **B. Comments in Support**

The 62 substantive comments in support collectively emphasized several benefits to individuals and society of allowing inmates to remain in CARES Act home confinement after the expiration of the covered emergency period. Among the benefits mentioned are (1) the already-active and continuing process of their reintegration into society; (2) rehabilitative steps they have taken toward becoming contributing members of their community; (3) gainful employment they have secured or educational courses in which they have enrolled; (4) continued care for children or elderly parents; and (5) relationships with family and friends that have begun to mend.

---

<sup>25</sup> See generally Section II.C. of the preamble to the proposed rule (87 FR 36790–92).

<sup>26</sup> See generally Section II.D. of the preamble to the proposed rule (87 FR 36792–93).

<sup>27</sup> See generally Section II.E. of the preamble to the proposed rule (87 FR 36793–95).

<sup>28</sup> Of the 71 comments, three were duplicate electronic submissions; one comment was completely blank; and one comment was untimely, although the attachment to it was still added to comment BOP-2022-0001-0066, which was timely filed by the same organization. Thus, there are 66 substantive comments in total.

Additional benefits in support include (6) the notable cost savings to taxpayers; and (7) a reduction in health and safety risks to Bureau staff and inmates that result from overcrowding.

While the 34 substantive statements in support, with suggested revisions, were in favor of the final rule, these commentors also put forth four revisions, and urged the Department either to place the revisions in the text of the final rule or to address them in a separate rulemaking. The various suggested revisions include: (1) expanding CARES Act home confinement eligibility based on existing law to increase the number of inmates considered for placement; (2) clarifying that sentence length will not be used as a criterion for return to secure custody; (3) establishing clear objective criteria Bureau-wide so inmates in home confinement are on notice of what potential rule violations would prompt a return to secure custody; and (4) creating an administrative process by which inmates accused of violations and presented with a return to secure custody can avail themselves of due process protections and challenge their alleged violations. Each of these four suggested revisions is discussed separately in Section C of this preamble.

The Department first briefly addresses each of the 7 benefits raised by the 62 comments in support, noting that 22 of the commentors self-identified as either a Bureau inmate currently in CARES Act home confinement, or a family member of a Bureau inmate affected directly by CARES Act home confinement.

*(1) The already-active process of these individuals' reintegration into society*

Several commentors noted that some inmates have been in home confinement since the earliest days of the pandemic, meaning they have already spent nearly two and a half years reintegrating into society. One commentor noted that since being placed in home confinement on December 29, 2020, she has become a successfully integrated, law-abiding citizen. She urged the Department to allow those like her to continue being successful by remaining in home confinement. Another commentor stated he has just over 4 years remaining on his sentence, and that he is employed and provides care for his elderly parents. He also noted he has lost weight

and that, as a result, his diabetes and blood pressure are better managed. Yet another commentor, in home confinement since May 2021, remarked that he started a job as a paralegal, became a part-time student at a university, and is engaged in rebuilding relationships with his parents, who are in their 70s.

*(2) The rehabilitative steps these individuals have taken toward becoming valuable members of their communities*

Several commentors touted the rehabilitative steps inmates in home confinement have already taken. One commentor emphasized that individuals uninterested in pursuing criminal activity inside prison do better at home and with supportive families, rather than remaining inside a prison where such criminal enterprises sometimes thrive. Another commentor, in expressing concern about whether he would be among the inmates recalled to secure custody from home confinement, noted that such a result would separate him from his job, church, family care, and his own medical care—all of which have aided him in his rehabilitation. A commentor in home confinement since May 2020 said being home has empowered him and other elderly inmates like him to become productive members of society once again, and to proactively manage their age-related health conditions.

*(3) The gainful employment they have secured or educational courses in which they have enrolled*

Several commentors noted that some inmates in home confinement have enrolled in classes or secured jobs. Enrollment in college, gainful employment, and community volunteer work have been made possible by these inmates' placement in home confinement in the communities where they intend to live. They have been able to develop and improve their future educational or employment opportunities in their communities.

*(4) The care for elderly parents or children for whom they have been providing*

Several commentors specifically raised the issues of parent-care and childcare, and how being home has enabled them to provide that care and lessen the burden for other caregivers. One commentor underscored how his time in home confinement has allowed him to care for his

elderly parents, both of whom have experienced markedly improved health due, in part, to his care for them. Other commentators emphasized the familial benefits of having mothers and fathers at home with children.

*(5) The relationships with family and friends that have begun to mend*

Many commentators noted that inmates placed in home confinement have had months, and, in some cases, years, to begin the time-intensive and difficult process of trying to mend relationships with family and friends. The crux of these commentators' concern was that abruptly returning any of these inmates to secure custody would jeopardize the progress already made and would threaten to negate the efforts already expended.

*(6) The notable cost savings to taxpayers*

Several commentators also touted as a benefit to taxpayers the statistics cited in the proposed rule, showing how much less it costs to supervise an inmate in CARES Act home confinement than housing that same individual in secure custody inside a Bureau institution. Most of these commentators indicated they view a reduction in prison populations by operation of a program that supervises home confinement inmates for significantly less money to be a win-win for the taxpaying public and the overburdened prison system.

*(7) The reduction in health and safety risks to Bureau staff and inmates that result from crowding*

A few commentators viewed the proposed rule as providing a benefit to the health and safety of inmates and staff, alike. With vulnerable inmates being transferred to home confinement, prison populations shrink and the problem of crowding improves, thereby reducing health and safety risks to other inmates and Bureau staff.

**Department Response:** The Department agrees with these comments and believes the seven benefits noted by them are, indeed, important considerations in support of this final rule. Congress itself, as demonstrated through the passage of the Second Chance Act of 2007 ("SCA") and the First Step Act of 2018, has consistently shown its intention in passing legislation aimed

at appropriately preparing inmates for successful reintegration into society. Part of addressing this congressional intent involves an ongoing reevaluation of the societal and individualized benefits of incarceration versus non-custodial rehabilitative programs.

The Department and the Bureau know home confinement provides important penological benefits as one of the last steps in the reentry process. An inmate would usually be moved over the course of a sentence to progressively less restrictive conditions of confinement—often from a secure prison, to a residential reentry center, to home confinement—to provide transition back into the community with support, resources, and supervision from the agency. Inmates who are provided the types of benefits home confinement can afford, such as opportunities to rebuild ties to family and to return to the workplace and to the community, may ultimately be less likely to recidivate.<sup>29</sup> Accordingly, the best use of Bureau resources and the best outcome for affected offenders is to allow the agency to make individualized assessments of CARES Act placements with a focus on inmates’ eventual reentry into the community.

Supervision of inmates in home confinement is also significantly less costly for the Bureau than housing inmates in secure custody. In Fiscal Year (“FY”) 2019, the cost of incarceration fee (“COIF”) for a Federal inmate in a Federal facility was \$107.85 per day; in FY 2020, it was \$120.59 per day.<sup>30</sup> In contrast, according to the Bureau, an inmate in home confinement costs an average of \$55.26 per day—less than half the cost of an inmate in secure custody in FY 2020. Although the Bureau’s decision to place an inmate in home confinement is based on many factors, where the Bureau deems home confinement appropriate for a particular inmate, that decision has the added benefit of reducing the Bureau’s expenditures. Such cost

---

<sup>29</sup> See SCA, Pub. L. 110-199, sec. 3(b)(6), (7), (19), 122 Stat. 657, 659–60 (2008) (“According to the Bureau of Prisons, there is evidence to suggest that inmates who are connected to their children and families are more likely to avoid negative incidents and have reduced sentences. . . . Released prisoners cite family support as the most important factor in helping them stay out of prison. . . . Transitional jobs programs have proven to help people with criminal records to successfully return to the workplace and to the community, and therefore can reduce recidivism.”).

<sup>30</sup> Annual Determination of Average Cost of Incarceration Fee (COIF), 86 FR 49060, 49060 (Sept. 1, 2021).

savings were among the intended benefits of the First Step Act, regarding which Congress cited a need to “control corrections spending, manage the prison population, and reduce recidivism.”<sup>31</sup>

Finally, the Bureau needs flexibility to consider whether continued home confinement for CARES Act inmates is in the interest of the public health, and whether reintroduction of CARES Act inmates into secure facilities would create the risk of new outbreaks of COVID-19 among the prison population—even after the conclusion of the broader pandemic emergency. It is now well established that congregate living settings, and correctional facilities in particular, heighten the risk of COVID-19 spread due to multiple factors.<sup>32</sup> Data have shown that crowding in prisons, which makes social distancing difficult, if not impossible, is associated with increased incidence of COVID-19.<sup>33</sup> Although COVID-19 vaccines are widely available and effective at preventing serious illness, hospitalization, and death, and also help protect against infection, not all incarcerated persons will elect to receive COVID-19 vaccinations,<sup>34</sup> and breakthrough infections may occur even in fully vaccinated persons, who are then able to spread the disease.<sup>35</sup>

More contagious variants of the virus that causes COVID-19 could exacerbate the spread, and it is unknown whether currently available vaccines will be effective against new variants that

---

<sup>31</sup> See, e.g., H.R. Rep. No. 115-699, at 22–24 (2018) (“The federal prison system needs to be reformed through the implementation of corrections policy reforms designed to enhance public safety by improving the effectiveness and efficiency of the federal prison system in order to control corrections spending, manage the prison population, and reduce recidivism.”).

<sup>32</sup> See, e.g., Pandemic Response Accountability Committee, *Key Insights: COVID-19 in Correctional and Detention Facilities*, at 2 (May 12, 2021), <https://www.oversight.gov/sites/default/files/oig-reports/PRAC/Key-Insights-COVID-19-Correctional-and-Detention-Facilities.pdf>; Nat’l Academies of Sciences, Engineering, and Medicine, *Decarcerating Correctional Facilities During COVID-19: Advancing Health, Equity, and Safety* 23–44 (Emily A. Wang et al., eds., 2020), <https://doi.org/10.17226/25945>.

<sup>33</sup> Abigail I. Leibowitz et al., *Association Between Prison Crowding and COVID-19 Incidence Rates in Massachusetts Prisons, April 2020-January 2021*, 181 JAMA Internal Med. 1315 (2021); see also Nat’l Academies of Sciences, Engineering, and Medicine, *Decarcerating Correctional Facilities During COVID-19: Advancing Health, Equity, and Safety* 26–27 (Emily A. Wang et al., eds., 2020), <https://doi.org/10.17226/25945>.

<sup>34</sup> An early study demonstrated that around 64 percent of persons incarcerated in BOP institutions who were offered COVID-19 vaccinations accepted them. See Liesl M. Hagan et al., *COVID-19 vaccination in the Federal Bureau of Prisons, December 2020-April 2021*, 39 Vaccine 5883, 5883, 5887 (2021).

<sup>35</sup> CDC, *COVID-19 After Vaccination: Possible Breakthrough Infection* (updated June 23, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/effectiveness/why-measure-effectiveness/breakthrough-cases.html>.

may arise. Accordingly, it is appropriate for the Department to consider whether the reintroduction into prison populations of individuals placed in home confinement, in part upon consideration of their vulnerability to COVID-19,<sup>36</sup> and the resulting increased crowding in prison settings, could lead to new COVID-19 outbreaks, including breakthrough cases in fully vaccinated inmates and infections in the most vulnerable prisoners.

### **C. Comments with Suggested Revisions**

The 34 substantive statements in support, with suggested revisions, collectively propose four changes either to the final rule or by operation of a separate notice-and-comment rulemaking. Each proposed revision is discussed below.

#### *(1) Expanding CARES Act home confinement eligibility based on existing law to increase the number of inmates who can be considered*

Twelve commentors specifically called for the expansion of CARES Act home confinement to increase the number of inmates who initially qualify. These comments focused on expansion of the program to include more non-violent offenders (especially those with drug offenses), regardless of the time left to serve on their sentences. These commentors suggest that violent offenders should remain in secure custody, but they urge the Department and the Bureau to broaden the criteria for CARES Act home confinement so that others may qualify. These commentors cite to the statistics and arguments contained in the proposed rule in support of the conclusion that the CARES Act home confinement program not only works, but also has been a success.

**Department Response:** The Department interprets these commentors' suggestion to be an expansion of the current eligibility criteria that are in place and that were developed by the Bureau in light of the Attorney General's April 3, 2020, memorandum. In that memorandum,

---

<sup>36</sup> See Memorandum for the Director, BOP, from the Attorney General, *Re: Prioritization of Home Confinement As Appropriate in Response to COVID-19 Pandemic* at 1–2 (Mar. 26, 2020), [https://www.bop.gov/coronavirus/docs/bop\\_memo\\_home\\_confinement.pdf](https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement.pdf) (directing the Bureau to consider, among other discretionary factors, “[t]he age and vulnerability of [an] inmate to COVID-19” when assessing which inmates should be placed in home confinement).

the Attorney General instructed the Director to use the expanded home confinement authority provided in the CARES Act to place in home confinement the most vulnerable inmates at the facilities most affected by COVID-19, following quarantine to prevent the spread of COVID-19 into the community, and guided by the factors set forth in the March 26, 2020, memorandum.<sup>37</sup> The April 3, 2020, memorandum made clear that although the Bureau should maximize the use of home confinement, particularly at affected institutions, the Bureau must continue to make an individualized determination whether home confinement is appropriate for each inmate considered and must continue to act consistently with its obligation to preserve public safety.<sup>38</sup>

The Bureau subsequently issued internal guidance that, in addition to adopting the criteria in the Attorney General's memoranda, prioritized for home confinement inmates who had served 50 percent or more of their sentence or those who had 18 months or less remaining on their sentence and had served more than 25 percent of that sentence.<sup>39</sup> That guidance also instructed that pregnant inmates should be considered for placement in a community program, to include home confinement.<sup>40</sup> The BOP later clarified that inmates with low or minimum PATTERN scores qualify equally for home confinement, and that the factors assessed to ensure inmates are suitable for home confinement include verifying that an inmate's current or a prior offense was not violent, not a sex offense, and not terrorism related.<sup>41</sup> It further implemented a requirement that inmates placed in home confinement receive instruction about how to protect themselves

---

<sup>37</sup> Memorandum for the Director, BOP, from the Attorney General, *Re: Increasing Use of Home Confinement at Institutions Most Affected by COVID-19*, at 2 (Apr. 3, 2020), [https://www.bop.gov/coronavirus/docs/bop\\_memo\\_home\\_confinement\\_april3.pdf](https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement_april3.pdf).

<sup>38</sup> *See id.* at 3.

<sup>39</sup> *See, e.g.*, Memorandum for Chief Executive Officers, from Andre Matevousian *et al.*, BOP, *Re: Home Confinement*, at 2 (Nov. 16, 2020), [https://www.bop.gov/foia/docs/Updated\\_Home\\_Confinement\\_Guidance\\_20201116.pdf](https://www.bop.gov/foia/docs/Updated_Home_Confinement_Guidance_20201116.pdf).

<sup>40</sup> *Id.*

<sup>41</sup> *See id.*



and others from COVID-19 transmission, based on guidance from the CDC.<sup>42</sup>

The Department believes that allowing the Bureau to continue using internally developed criteria to evaluate inmates' requests for home confinement is consistent with the CARES Act and the Attorney General's guidance, and that such criteria have already led to a marked increase in the number of inmates placed in CARES Act home confinement. Since March 2020, following the Attorney General's directive, the Bureau has significantly increased the number of inmates placed in home confinement under the CARES Act and other preexisting authorities. Accordingly, the Department declines to limit the discretion afforded to the Director to implement certain criteria that, in the Director's judgment, are necessary to the proper allocation of Bureau resources.

*(2) Clarifying that sentence length will not be used as a criterion for return to secure custody*

Ten commentors urged the Department not to allow the Bureau to consider the length of time remaining on an inmate's sentence as an independent criterion as part of any set of objective factors used to determine whether an inmate may remain in home confinement. Commentors who raised this concern do not think the Director's discretion should extend to allowing the length of time remaining on an inmate's sentence to be an independent criterion for return-to-custody consideration. As one commentor wrote, language should be included to clarify "that no one should be returned to prison solely based on the amount of time they have left" on their sentence. In support of this proposed revision, the same commentor cited to a sentence in the proposed rule that reads in part that "the widespread return of prisoners to secure custody without a disciplinary reason would be unprecedented." The comment continued by noting the seemingly conflicting language in the Bureau's former General Counsel's December 10, 2021, memorandum, in which he noted that the Bureau's criteria for determining which inmates should

---

<sup>42</sup> See *id.* at 3.

return to secure custody “will likely include . . . the length of time remaining on the sentence.”<sup>43</sup>

The comment also highlighted these sentences from that memorandum: “Sentence length is likely to be a significant factor, as the more time that remains will provide the agency a more meaningful opportunity to provide programming and services to the offender in a secure facility. . . . It is likely that inmates that have longer terms remaining would be returned to secure custody, while those with shorter terms left who are doing well in their current placement would be allowed to remain there, subject to the supervisory conditions described above.”<sup>44</sup> The commentor’s concern is that the representations in the December 10, 2021, memorandum make it reasonably clear that the Bureau would consider the length of time remaining on a sentence as one of several criteria developed to determine which inmates will return to secure custody.

**Department Response:** The Department understands this concern, which, at its core, laments the lack of any definitive assurance upon which individuals in CARES Act home confinement can currently rely to know whether the length of time remaining on their sentences will prompt their return to secure custody. The Department reiterates that, under typical circumstances, inmates who have made the transition to home confinement would not be returned to a secure facility absent a disciplinary reason. This is because the typical purpose of home confinement is to allow inmates to readjust to life in the community. Removal from the community of those already making progress in home confinement would frustrate this goal, and the widespread return of prisoners to secure custody without a disciplinary reason would be unprecedented and out of step with the reentry-specific goals of home confinement, as mentioned throughout this final rule.

While the Department understands these commentors’ concern with respect to this issue,

---

<sup>43</sup> See Memorandum for Christopher H. Schroeder, Assistant Attorney General, OLC, from Ken Hyle, General Counsel, BOP, *Re: Views Regarding OLC Opinion, “Home Confinement of Federal Prisoners After the COVID-19 Emergency” dated January 15, 2021*, at 5–6 (Dec. 10, 2021), [https://www.aclu.org/sites/default/files/field\\_document/bop\\_cares\\_memo\\_12.10.21.pdf](https://www.aclu.org/sites/default/files/field_document/bop_cares_memo_12.10.21.pdf).

<sup>44</sup> *Id.* at 6.

the Department declines to include in the final rule language withdrawing discretion from the Director to consider the length of time remaining on an inmate's sentence as part of a set of criteria to determine which inmates may return to secure custody after the end of the covered emergency period. Allowing the Bureau discretion to determine whether inmates who have been successfully serving their sentences in the community should remain in home confinement will allow the Bureau to ground those decisions upon case-by-case assessments consistent with penological, rehabilitative, public health, and public safety goals.

However, the Department re-emphasizes that following the issuance of this final rule, the Bureau will develop, in consultation with the Department, guidance to explain criteria it will use to make individualized determinations as to whether any inmate placed in home confinement under the CARES Act should be returned to secure custody. The Department and the Bureau commit to working together as expeditiously as practicable after issuance of this final rule to develop these criteria.

*(3) Establishing clear objective criteria Bureau-wide so inmates in home confinement are on notice of what potential rule violations would prompt a return to secure custody*

Fourteen commentors expressed concern that the rule does not contain objective criteria for what constitutes a violation that would return an inmate to secure custody, and four commentors specifically expressed that the Director should not be granted the discretion to develop criteria to be used to determine which individuals may be returned to secure custody. These four commentors ask that the objective criteria be published in this final rule or, alternatively, developed as part of a separate notice-and-comment rulemaking.

The concerns about a lack of objective criteria in the rule are rooted in these commentors' belief that the Bureau will abuse the discretion given by the final rule and, as a result, will develop a set of criteria they worry will run counter to the goals and intent expressed in this rule. These commentors also argued that the individuals in CARES Act home confinement should know sooner rather than later whether they may be one of those subject to being returned to

secure custody. Commentors urged the Department to adopt in this final rule a presumption that individuals placed in CARES Act home confinement should remain there absent a showing they have engaged in a significant violation of their conditions of release. Another commentor stated that language should be included limiting the Director's discretion to return an inmate to secure custody only "for a serious violation of their terms of release" or "for new crimes" committed while in home confinement. The concern with the discretion given to the Director is that it allows the Director "to return individuals to prison for ill-defined and vague reasons." This lack of boundaries, the commentors continued, is a "potential loophole for arbitrary and capricious decision-making."

These commentors go on to say that the Bureau "should issue a new proposed rule—subject to notice and comment rulemaking—that clearly enumerates the conduct that would warrant return to a correctional facility. It should also make clear that the enumerated conduct is limited to only the most serious and verified violations." They also urged the Department to "establish clear criteria and procedures for returning an individual from home confinement to a correctional facility." Specifically, "[a]ny return to a correctional facility should be triggered only by a serious violation of the conditions of home confinement, determined on the basis of articulated factors, and consistent with constitutional due process." The commentors' concerns involve primarily what they describe as "technical missteps" that do not threaten community safety and should not be grounds for a revocation. These commentors end with: "A clear, publicly available rule that establishes *how* BOP will exercise any discretion, that is available to the public and individuals in BOP custody, and that is not subject to easy change outside the public view, will assist in providing that stability. Indeed, engaging in rulemaking here is legally mandated if BOP intends to treat this guidance as internally binding on BOP officials. For all relevant purposes, binding guidance constitutes a rule and should be subject to notice-and-comment procedures. *See generally Appalachian Power Co. v. Environmental Protection Agency*, 208 F.3d 1015 (D.C. Cir. 2000)."

Another commentor, concerned with “vague and amorphous standards for revoking supervision,” argued for objective and clearly defined criteria for reincarceration, along with a “graduated sanctions matrix for technical violations . . . that provide[s] for interim sanctions for low-level or technical violations of supervision conditions.” This commentor continued: “These matrices provide supervision officers tools to address minimal non-compliance without resorting to total revocation, which is costly and administratively burdensome. A similar matrix should be developed as part of the Bureau’s new guidance on revocation of home confinement.”

**Department Response:** The Department remains sensitive to commentors’ desire for a clear set of criteria the Bureau will use to determine whether an inmate will be returned to secure custody. However, the Department declines to use this final rule to limit the discretion afforded to the Director to develop a set of objective criteria, in consultation with the Department. The Department also disagrees that the creation of these objective criteria must be done through a separate notice-and-comment rulemaking. Instead, the Department believes the Bureau’s future development of policy and its issuance of advisory memoranda can provide the clarity sought in these comments.

Allowing the Bureau discretion to develop these criteria will leave the Bureau with one of its most important tools—the ability to effectively manage bedspace based on the needs of the offender, security requirements, and agency resources. Congress has explicitly provided the Bureau responsibility for maintaining custody of Federal inmates<sup>45</sup> and discretion to designate the place of those inmates’ imprisonment.<sup>46</sup> Courts have recognized the Bureau’s authority to

---

<sup>45</sup> 18 U.S.C. 3621(a) (“A person who has been sentenced to a term of imprisonment . . . shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed . . .”).

<sup>46</sup> See 18 U.S.C. 3621(b) (providing that “[t]he Bureau of Prisons shall designate the place of the prisoner’s imprisonment,” taking into account factors such as facility resources; the offense committed; the inmate’s history and characteristics; recommendations of the sentencing court; and any pertinent policy of the United States Sentencing Commission). Section 3621(b) also authorizes the Bureau to direct the transfer of a prisoner at any time, subject to the same individualized assessment. See *id.*

administer inmates' sentences,<sup>47</sup> supporting this management principle. The Bureau's ability to control populations in Bureau-operated institutions as well as, where appropriate, in the community, allows the Bureau flexibility to respond to circumstances as varied as increased prosecutions or responses to local or national emergencies or natural disasters. Providing the Bureau with discretion to determine whether any inmate placed in home confinement under the CARES Act should return to secure custody will increase the Bureau's ability to respond to outside circumstances and manage its resources in an efficient manner that considers both public safety and the needs of individual inmates.

The Department emphasizes that, under typical circumstances, inmates who have made the transition to home confinement would not be returned to a secure facility absent a disciplinary reason, because the typical purpose of home confinement is to allow inmates to readjust to life in the community. Removal from the community would therefore frustrate this goal. And the widespread return of prisoners to secure custody without a disciplinary reason would be unprecedented. Moreover, allowing the Bureau discretion to determine whether inmates who have been successfully serving their sentences in the community should remain in home confinement will allow the Bureau to ground those decisions upon case-by-case assessments consistent with penological, rehabilitative, public health, and public safety goals.<sup>48</sup>

Additionally, the percentage of inmates placed in home confinement under the CARES Act that have had to be returned to secure custody for any violation of the rules of home confinement is very low; the number of inmates who were returned as a result of new criminal activity is a fraction of that. Instead, the vast majority of inmates in CARES Act home confinement have complied with the terms of the program and have been successfully serving

---

<sup>47</sup> See, e.g., *United States v. Wilson*, 503 U.S. 329, 335 (1992); *Rodriguez v. Copenhagen*, 823 F.3d 1238, 1242 (9th Cir. 2016).

<sup>48</sup> Such individualized assessments are consistent with direction the Bureau has received from Congress in other contexts. For example, Congress has made clear that the Bureau must base its determination of an inmate's place of imprisonment on an individualized assessment that takes into account factors such as the inmate's history and characteristics. See 18 U.S.C. 3621(b).

their sentences in the community. Accordingly, the Department does not believe the statistically low numbers of inmates returned to custody merit inclusion of criteria in this final rule or in a separate notice-and-comment rulemaking. The Department and the Bureau remain committed to considering multiple factors when developing common criteria to govern these case-by-case assessments, thereby promoting operational efficiency. In furtherance of that commitment, the Department and Bureau intend to make the agreed-upon criteria publicly available once developed.

*(4) Creating an administrative procedure by which inmates accused of violations and threatened with a return to secure custody can avail themselves of due process protections and challenge their alleged violations*

Fourteen commentors expressed support for the creation of an administrative process by which inmates accused of violating the terms of their home confinement may challenge those violations prior to being returned to secure custody. Specifically, these commentors urged the Department to ensure individuals receive due process, including the opportunity to contest the allegations at a hearing before a neutral decision maker, with the assistance of counsel and the ability to confront witnesses and present evidence. They also indicated their belief that an inmate's placement in CARES Act home confinement creates a liberty interest in remaining on that status, and the threatened revocation of such an interest must be preceded by a process similar to that used in parole or probation revocations. Some of the commentors expressed concern that the Bureau did not permit an inmate's counsel to participate in the process of home confinement revocation, going on to argue that the Bureau "should establish rules permitting retained counsel to participate in all stages of the revocation process and provide for the appointment of counsel for indigent people facing return to a correctional facility who do not have attorneys."

One commentor offered the following regarding administrative or judicial review: "Confinees should be given the right to administrative or judicial review of a decision to

reincarcerate. Such review would be unlikely to create a substantial administrative burden, as recent experience suggests—the Bureau, for example, acknowledged in the proposed rule that ‘violations of the conditions of home confinement requiring return have been rare during the pandemic emergency . . . and very few inmates placed in home confinement under the CARES Act have committed new crimes.’ 87 Fed. Reg. at 36,788. This experience suggests that few if any confinees will be subject to reincarceration in future emergencies.”

**Department Response:** As an initial matter, the Department notes inmates who violate the terms of home confinement, including CARES Act home confinement, are not necessarily returned to secure custody. BOP’s progressive discipline for home confinement violations mitigates an all-or-nothing approach, allowing BOP to only impose restrictions commensurate with the circumstances of the violation. Violations are examined based on severity and alongside any prior violations to determine how the terms of home confinement should be adjusted. Progressive discipline may begin with increased controls and checks, while allowing the inmate to remain in their home. For moderate violations, the inmate may be placed in a residential reentry center. Only serious or chronic violations will necessarily result in return to secure custody.

The Department further notes that the Bureau does have an established process by which those in CARES Act home confinement may contest the violation that prompted the decision to return the inmate to secure custody. It is called the Administrative Remedy Program. Whether the inmate is appealing increasingly strict conditions of confinement or a full return to secure custody, the Administrative Remedy Program provides a structured avenue of review and relief.

The Department also notes that Federal regulations and Bureau policy regarding the Administrative Remedy Program have always provided for the filing of a grievance and appeal



by Bureau inmates in community custody.<sup>49</sup> The regulation, which refers to Community Corrections Centers (now known as Residential Reentry Centers), includes inmates in home confinement. Under the regulation, the “Community Corrections Manager” (the same position as the current position of Residential Reentry Manager (RRM)) is responsible for the implementation and operation of the Administrative Remedy Program at the Community Corrections Center (CCC).<sup>50</sup> Like any other inmates monitored in community custody, inmates in home confinement need not first attempt informal resolution before filing a grievance.<sup>51</sup> The timelines outlined in the Administrative Remedy Program apply to home confinement inmates, who are also entitled to file an appeal of an adverse disciplinary action.<sup>52</sup> The RRM for the region in which the inmate is located must respond to the grievance or appeal within the timeframe outlined in the regulation.<sup>53</sup>

The Department has maintained that placement in CARES Act home confinement does not create a constitutionally protected liberty interest.<sup>54</sup> We therefore decline to develop a separate administrative process by which inmates in CARES Act home confinement may challenge revocations, either by inclusion in this final rule or through a separate notice-and-comment rulemaking.

#### **D. Comment in Opposition**

The Department received only one comment in opposition to the proposed rule. The

---

<sup>49</sup> See 28 CFR 542.10(b) (noting the “Program applies to all inmates in institutions operated by the Bureau of Prisons, [and] to inmates designated to contract Community Corrections Centers (CCCs) under Bureau of Prisons responsibility”).

<sup>50</sup> 28 CFR 542.11(a).

<sup>51</sup> 28 CFR 542.13(b).

<sup>52</sup> 28 CFR 542.14(a).

<sup>53</sup> 28 CFR 542.18.

<sup>54</sup> See, e.g., *Cardoza v. Pullen*, 3:22-CV-00591 (SVN), 2022 WL 3212408 (D. Conn. Aug. 9, 2022); *Frank v. Ramos*, No. 5:21-HC-02174-M, 2022 WL 1377950 (E.D.N.C. May 2, 2022); see also *Hatch v. Lappin*, 660 F. Supp. 2d. 104 (D. Mass. 2009); cf. *Touizer v. Att’y Gen.*, No. 21-10761, 2021 WL 3829618 (11th Cir. Aug. 21, 2021).

commentor concluded that the initial (January 2021) OLC opinion, which declared the Bureau would have been required to return all CARES Act home confinement inmates to secure custody at the expiration of the covered emergency period, was correct and represented the only tenable interpretation of the CARES Act. The commentor contended that, with the issuance of the second OLC opinion overruling the first one, the Department engaged in a results-oriented analysis employed in ignorance of the law and to appease criminal justice activists. The commentor noted that the proposal contemplated by the rule would lead to an absurd result because the Bureau would have 30 days after the end of the covered emergency period to move as many inmates as it wanted from secure custody to home confinement for the remainder of their sentences.

The commentor also said that the proposed rule ignores the changed circumstances surrounding the pandemic and the “materially affect the functioning” requirement, which the commentor claimed is arguably no longer met by current circumstances. The commentor cited four considerations present now that were not present at the beginning of the pandemic: (1) the wide availability of both vaccines and tests; (2) the fact that studies focused on “crowding” in prisons during COVID-19 were conducted prior to the wide availability of vaccines to inmates; (3) the ability of inmates to intentionally refuse to receive the vaccine in order to make themselves more vulnerable to infection; and (4) the proposed rule’s disregard for the “materially affect” phrase by relying on speculation about new variants that could exist or spread in the future.

**Department Response:** Initially, for the reasons articulated in Sections II.C. and II.D. of the preamble to the proposed rule, the Department disagrees that it should revert to the reasoning of the January 2021 OLC opinion. Instead, the Department reaffirms its reliance on the analysis contained in the December 2021 OLC opinion. The Department also disagrees with the commentator’s contention that this rule would lead to the “absurd result[]” of BOP, during the 30 days after the national emergency ends, “release[ing] as many inmates as possible to home

confinement and hav[ing] them stay there until the end of their sentences,” which would be “a scenario . . . not plausibly contained within the temporary authority that Congress granted to the Department . . . .” This concern is unwarranted. The BOP does not intend, nor does the Department intend to advise BOP, to move eligible inmates en masse to CARES Act home confinement in the 30 days following the ending of the national emergency.

Addressing the commentator’s argument that the rule ignores four changed circumstances: First, the Department does not dispute the public health value of widespread testing and readily available vaccines, but unfortunately, neither testing nor vaccination can guarantee that inmates, especially medically vulnerable ones, will not contract any of a number of variants of COVID-19 while incarcerated. While the risk of severe illness or death is lower for those who are fully vaccinated, risk remains, and there are also some inmates whose medical history and vaccination status make them more susceptible to infection or to experiencing severe symptoms. Moreover, the BOP does not require vaccination of inmates. The commentator also suggests mandatory testing of visitors to BOP institutions. This raises several concerns: the issues of what tests BOP would accept, and from what medical service providers; the fact that denying counsel entry for client visitation, either for refusal to test or unacceptable proof of negative status, creates serious due process concerns for the client, particularly in the time-sensitive pretrial context; to the extent that the commentator is suggesting that BOP itself administer tests to visitors, diverting critical medical staff devoted to inmate health care to administer and interpret these tests, and finally, the lack of space outside the secure perimeter to convert into makeshift testing and waiting areas at some institutions.

Second, studies published early in the pandemic about overcrowding and the spread of the virus within correctional institutions are no less compelling and relevant today in cautioning

against recalling to secure custody those inmates who have been placed in home confinement.<sup>55</sup> Even with the availability of testing and vaccines, the Department maintains that a multi-faceted approach to mitigating the spread of COVID-19 within the Federal prison population is the most effective way to protect vulnerable inmates.

Third, regarding the Department’s justification for the rule based in part on inmates’ right to refuse vaccination, the Department reiterates that inmates retain certain rights during incarceration, including a limited right to accept or reject medical treatment. Granting the BOP Director discretion to keep inmates in CARES Act home confinement allows for the flexibility needed to mitigate the spread of COVID-19.

Fourth, new variants and sub-variants have already become dominant in the community. The short- and long-term impacts of these variants—some of which have evolved to be increasingly effective at circumventing immunity acquired through vaccinations and infections—remain uncertain. Therefore, it is reasonable and prudent to prepare for the potential impact of a new COVID-19 variant on the Federal inmate population.

\* \* \*

The Department recognizes that there are other potential costs to inmates serving longer sentences in home confinement as a result of the CARES Act. For example, these inmates might lose the opportunity to participate in potentially beneficial programming and treatment offered only in BOP facilities, which they might have otherwise taken advantage of if in secure custody. In addition, most sentencing courts anticipated that offenders would be incarcerated in a secure facility, and there may be concern that placing inmates in home confinement for longer periods might not appropriately honor the intent of the courts, the interests of prosecuting United States Attorney’s Offices, any impact on victims or witnesses, possible deterrence effects in the

---

<sup>55</sup> While a vaccinated inmate population is “an extremely effective tool for the prevention of COVID-19 in prisons[.]” as of early last year, there have been “few studies evaluating COVID-19 in prisons and vaccination.” Massimiliano Esposito *et al.*, *The Risk of COVID-19 Infection in Prisons and Prevention Strategies: A Systematic Review and a New Strategic Protocol of Prevention*, 10 Healthcare, at 4, 10 (2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8872582/>.

community, or other aspects of the Department's mission. These costs are all mitigated, however, by retaining the Director's discretion.

As the low percentage of inmates placed in CARES Act home confinement returned to secure custody shows, the Bureau can effectively manage public safety concerns associated with the low-risk inmates placed in home confinement under the CARES Act for longer periods of time. Indeed, of the nearly 5,000 inmates placed in home confinement under the CARES Act, as of January 16, 2023, only 515 had been returned to secure custody for any reason, and only 21 for committing a new crime. Individuals placed in home confinement under the CARES Act, like other inmates in home confinement, remain in the custody of the Bureau.

Before being placed in home confinement, inmates sign agreements that require consent to submit to home visits and drug and alcohol testing, acknowledgement of monitoring requirements, and an affirmation that they will not engage in criminal behavior or possess firearms. Under these agreements, individuals placed in home confinement are subject to electronic monitoring; check-in requirements; drug and alcohol testing; and transfer back to secure correctional facilities for any significant disciplinary infractions or violations of the agreement.<sup>56</sup> CARES Act inmates who remain in home confinement after the end of the covered emergency period would continue to be subject to these requirements until the end of their sentences, and possibly into a term of supervised release. Data show that these procedures have been working to preserve public safety where inmates were placed on extended home confinement under the CARES Act, and the Department expects that such measures will continue to be effective after the end of the covered emergency period.<sup>57</sup> Thus, in the

---

<sup>56</sup> See BOP, Program Statement 7320.01, Home Confinement (Sept. 6, 1995), as updated by Change Notice (Dec. 15, 2017), [https://www.bop.gov/policy/progstat/7320\\_001\\_CN-2.pdf](https://www.bop.gov/policy/progstat/7320_001_CN-2.pdf).

<sup>57</sup> Previous research has similarly shown that inmates can maintain accountability in home confinement programs. See, e.g., Darren Gowen, *Overview of the Federal Home Confinement Program 1988-1996*, 64 Fed. Prob. 11, 17 (2000) (finding that 89 percent of 17,000 individuals placed in home confinement between 1988 and 1996

Department's interpretation and discretion, the aspects of a criminal sentence that preserve public safety can be managed in this context while also allowing individuals to more effectively prepare for life when their criminal sentences conclude.

### **III. Regulatory Certifications**

#### **A. Regulatory Flexibility Act**

The Attorney General, under the Regulatory Flexibility Act (5 U.S.C. 605(b)), reviewed this rule and by approving it certifies that it will not have a significant economic impact upon a substantial number of small entities for the following reasons: This rule pertains to the correctional management of offenders committed to the custody of the Attorney General or the Director of the Bureau of Prisons, and its economic impact is limited to the Bureau's appropriated funds.

#### **B. Executive Orders 12866 and 13563**

This rule has been drafted and reviewed in accordance with section 1(b) of Executive Order 12866 (Regulatory Planning and Review) and section 1(b) of Executive Order 13563 (Improving Regulation and Regulatory Review).

This rule falls within a category of actions that the Office of Management and Budget (OMB) has determined to constitute a "significant regulatory action" under section 3(f) of Executive Order 12866 because it may raise novel legal or policy issues arising out of implementation of section 12003(b)(2) of the CARES Act and, accordingly, it was reviewed by OMB.

The Department has assessed the costs and benefits of this rule as required by section 1(b)(6) of Executive Order 12866 and has made a reasoned determination that the benefits of this rule justify its costs.

---

successfully completed their terms without incident). In addition, studies have found that efforts to decarcerate prisons in other contexts, which were not limited to home confinement measures, did not harm public safety. *See, e.g., Jody Sundt et al., Is Downsizing Prisons Dangerous? The Effect of California's Realignment Act on Public Safety*, 15 *Criminology & Pub. Policy* 315 (2016).

The economic impact of this rule is limited to a specific subset of inmates who were placed in home confinement pursuant to the CARES Act and are not otherwise eligible for home confinement at the end of the covered emergency period. As of January 23, 2023, 3,434 inmates had been placed in home confinement under the CARES Act; 2,026 of those inmates had release dates in more than 12 months. The Department expects these numbers will continue to fluctuate as inmates serve their sentences and the Bureau conducts individualized assessments to make home confinement placements under the CARES Act for the duration of the covered emergency period.

The Bureau has realized significant cost savings by placing eligible inmates in home confinement under the CARES Act relative to housing those inmates in secure facilities, and it expects those cost savings to continue for inmates who remain in home confinement under the CARES Act following the end of the covered emergency period. Although the Bureau has not yet published the average COIF for FY 2021, in FY 2020 the average COIF for a Federal inmate in a Federal facility was \$120.59 per day.<sup>58</sup> The average cost for an inmate in home confinement was \$55.26 per day, representing a cost savings of approximately \$65.59 per day, per inmate, or approximately \$23,940.35 per year, per inmate. Although the numbers will likely differ for FY 2021 and beyond, the Department and the Bureau expect that the rule will benefit them as a result of the avoidance of costs the Bureau would otherwise expend to confine the affected inmates in secure custody. Because the affected inmates are currently serving their sentences in home confinement, there will be no new costs associated with this rulemaking.

As explained above, the rule will also have operational, penological, rehabilitative, public safety, and health benefits. These include increasing the Bureau's ability to control inmate populations in BOP facilities and in the community, allowing it to be responsive to changed circumstances; empowering the Bureau to make individualized assessments as to whether

---

<sup>58</sup> Annual Determination of Average Cost of Incarceration Fee (COIF), 86 FR 49060, 49060 (Sept. 1, 2021).

inmates placed in home confinement should remain in home confinement after the end of the covered emergency period, taking into account, for example, penological and rehabilitative goals and the public safety benefits associated with an inmate establishing family connections and finding employment opportunities in the community; and allowing the Bureau to weigh the ongoing risk of new COVID-19 outbreaks in BOP facilities against the benefit of returning any inmate to secure custody.

The Department has determined there is no countervailing risk to the public safety that outweighs the benefits of this rule. The percentage of inmates placed in home confinement under the CARES Act that have had to be returned to secure custody for any violation of the rules of home confinement is very low; the number of inmates who were returned as a result of new criminal activity is a fraction of that. The vast majority of inmates in CARES Act home confinement have complied with the terms of the program and have been successfully serving their sentences in the community. Thus, in the Department's assessment, public safety considerations do not undercut the benefits associated with allowing inmates placed in home confinement under the CARES Act to remain in home confinement after the expiration of the covered emergency period.

Other potential costs relate to inmates serving longer sentences in home confinement as a result of the CARES Act. These inmates might lose the opportunity to participate in potentially beneficial programming and treatment offered only in BOP facilities, which they might have otherwise taken advantage of if in secure custody. In addition, most sentencing courts anticipated that offenders would be incarcerated in a secure facility, and there may be concern that placing inmates in home confinement for longer periods might not appropriately honor the intent of the courts, the interests of prosecuting United States Attorney's Offices,<sup>59</sup> any impact on

---

<sup>59</sup> The Bureau, in its discretion, forwards certain home confinement cases to the prosecuting United States Attorney's Office for the input of prosecutors, taking any objections into account when approving or denying those cases.



victims or witnesses, possible deterrence effects in the community, or other aspects of the Department's mission. These costs are all mitigated, however, by retaining the Director's discretion to determine whether any inmate should be returned to secure custody based on an individualized assessment. The Department and the Bureau will consider the factors referenced in this paragraph when developing common criteria to govern these case-by-case assessments, thereby promoting operational efficiency.

**D. Executive Order 12988 (Civil Justice Reform)**

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 (Civil Justice Reform).

**E. Executive Order 13132 (Federalism)**

This rule will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, under Executive Order 13132, the Attorney General determines that this regulation does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

**F. Unfunded Mandates Reform Act of 1995**

This rule will not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501 *et seq.*

**G. Congressional Review Act**

This rule is not a major rule as defined by the Congressional Review Act, 5 U.S.C. 804.

**H. Paperwork Reduction Act of 1995**

This rule does not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3521.

## **List of Subjects in 28 CFR Part 0**

Authority delegations (Government agencies), Government employees, National defense, Organization and functions (Government agencies), Privacy, Reporting and recordkeeping requirements, Whistleblowing.

Accordingly, by virtue of the authority vested in me as Attorney General, including 5 U.S.C. 301, 18 U.S.C. 4001 and 28 U.S.C. 509, 510, part 0 of title 28 of the Code of Federal Regulations is amended as follows:

### **PART 0--ORGANIZATION OF THE DEPARTMENT OF JUSTICE**

1. The authority citation for part 0 continues to read as follows:

**Authority:** 5 U.S.C. 301; 28 U.S.C. 509, 510, 515-519.

2. In § 0.96, add paragraph (u) to read as follows:

#### **§ 0.96 Delegations.**

\* \* \* \* \*

(u) With respect to the authorities granted under the Coronavirus Aid, Relief, and Economic Security (CARES) Act:

(1) During the “covered emergency period” as defined by the CARES Act, when the Attorney General determines that emergency conditions will materially affect the functioning of the Bureau of Prisons (Bureau), lengthening the maximum amount of time for which the Director is authorized to place a prisoner in home confinement under 18 U.S.C. 3624(c)(2), as the Director determines appropriate.

(2) After the expiration of the “covered emergency period” as defined by the CARES Act, permitting any prisoner placed in home confinement under the CARES Act who is not yet otherwise eligible for home confinement under separate statutory authority to remain in home confinement under the CARES Act for the remainder of the prisoner’s sentence, as the Director determines appropriate, provided the prisoner is compliant with all conditions of supervision. In the event a prisoner violates the conditions of

supervision, Bureau staff may return the prisoner to secure custody, or may utilize progressive discipline as outlined in the Residential Reentry Center (RRC) contract, which may include possible placement in an RRC or contract facility in lieu of direct return to secure custody.

(3) This paragraph (u) concerns only inmates placed in home confinement under the CARES Act. It has no effect on any other inmate, including those placed in home confinement under separate statutory authorities.

Dated: March 30, 2023.

---

**Merrick B. Garland,**

*Attorney General.*

[FR Doc. 2023-07063 Filed: 4/3/2023 8:45 am; Publication Date: 4/4/2023]